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Supreme Court of the United States

OCTOBER TERM, 1964

No. 441

JOHN JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, MICHAEL JOSEPH ZAMPELLO, CAMILLO CHARLES LOMBARDOZZI and GEORGE LOMBARDOZZI,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit, as follows:

A. *Opinions Below*

The United States Court of Appeals for the Second Circuit by judgment entered on August 4, 1964, unanimously affirmed a judgment in the United States District Court for the Eastern District of New York convicting petitioners of an assault upon a Federal Officer in violation of Title 18

United States Code §111 after trial by a jury before the Honorable Walter Bruchhausen, a Judge of said Court.

The opinion of the United States Court of Appeals for the Second Circuit (not yet officially reported) is set forth in Appendix A hereto.

There were no other opinions written in connection with the case.

B. *The Grounds on Which the Jurisdiction of This Court Is Invoked*

Jurisdiction of this Court is invoked under Title 28, §1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1, of the Rules of This Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on August 4, 1964, as aforesaid.

C. *The Questions Presented for Review*

(1) Is scienter a necessary ingredient which must be proven to sustain a conviction under §111, Title 18, United States Code?

(2) Is the surveillance and taking of photographs by an F. B. I. agent at a private funeral sufficient to establish that he was "engaged in or on account of the performance of his official duties", as required to sustain a conviction under §111, Title 18, United States Code, when coupled with the Agent's conclusory assertion that this constituted an official duty?

(3) Was it prejudicial error in the circumstances of the case at bar for the trial court to refuse to allow cross-examination by defense counsel of a major prosecution witness as to his place of employment?

(4) Was it prejudicial error in the circumstances of the case at bar to allow the assaulted agent's gun to be received in evidence on the theory that inferentially it might have been used to commit the assault charged?

(5) Were the newspaper articles admittedly read by some of the jurors so inflammatory as to have required the granting of motions for a mistrial?

(6) Was it prejudicial error to allow prosecution witnesses to hold photographs of defendants in their hands immediately prior to identifying the defendant in the courtroom during the trial?

(7) Was the prosecutor's summation so prejudicial as to have deprived petitioners of a fair trial?

D. *Constitutional Provisions and Statutes Involved*

(1) The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution.

(2) The statute involved is §111 of Title 18 of the United States Code.

Each of the foregoing is set forth verbatim in Appendix B of this petition.

E. *A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented*

Petitioners and another were indicted in the Eastern District of New York (63 CR-324), under a one count indictment charging them with having assaulted an agent of the Federal Bureau of Investigation within the Eastern District of New York on April 3, 1963, in violation of Title 18, United States Code, Section 111.

Trial commenced before the Honorable Walter Bruchhausen, a United States District Judge and a jury in the United States District Court for the Eastern District of New York on November 12, 1963, and concluded with the verdict of the jury on November 26, 1963. By said verdict all petitioners were found guilty as charged. The other defendant was acquitted.

On January 24, 1964, each of the petitioners was sentenced by Judge Bruchhausen to be committed to the custody of the Attorney General for a period of twenty (20) months. On appeal to the Court of Appeals for the Second Circuit, the judgment of conviction was affirmed on August 4, 1964.

The circumstances of the case are as follows:*

On April 3, 1964, in the Borough of Brooklyn, City of New York, within the Eastern District of New York, funeral services were taking place at the Immaculate Heart of Mary Church for Carmelo Lombardozzi, the father of some of the petitioners, and the grandfather of others (9a). F. B. I. agent Foley and other agents had been assigned to "cover" the funeral (9a). There was a large number of at least 100 or more persons milling about the sidewalk in front of the church (38b, 188b). Agent Foley and the other agents were in the immediate vicinity of the church (11b, 22b, 25b-26b). Agent Foley had in his possession a briefcase containing a concealed camera designed to take photographs clandestinely (10a-11a). Agent Foley stated that he was in the vicinity that morning on official business of the Federal Bureau of Investigation (11a).

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* References in parentheses followed by "b" refer to the printed appendix filed by the Government in the Court of Appeals; like references followed by "a" are to the appendix filed by petitioners in the Court of Appeals.

With the exception of the foregoing, there was no evidence offered by the Government as to what the "official business" was or what connection, if any, it had with the proper duties of the Federal Bureau of Investigation (See Point II, *infra*).

Shortly thereafter, Agent Foley was struck from behind by a person not known to him. He was thereupon assaulted by various other persons unknown to him (29b-31b; 34b-35b). Later he got to his feet and found that the gun which had previously been in his possession was missing (12a, 14a). The gun was subsequently located inside the church (8a). Various witnesses purportedly identified the petitioners as having participated in the assault. None of the witnesses, however, saw the gun in the possession of any of the petitioners nor could they state that they saw the gun used in the course of the assault. To the contrary, the tenor of their testimony indicated that whoever committed the assault did so by the use of hands and feet.

The issue of the identity of the assailants was closely disputed at the trial. Each of the petitioners testified in his own behalf and denied participating in the assault. Other witnesses who testified in their behalf supported them. That issue, however, was resolved against them by the verdict of the jury.

At the trial, the following events occurred, which form the subject matter of this petition, and which were argued upon the appeal below:

At the close of the Government's case, motions for a judgment of acquittal were made. Among the grounds urged was the fact that the Government had offered no evidence to show that the petitioners had any knowledge that the person they allegedly assaulted was a Government agent. The motions were denied. The trial court subsequently

charged the jury that the Government was not required to prove the element of knowledge (57a). The Court also denied a request to charge the jury that knowledge must be established (61a) [See Point I, *infra*].

It was also urged upon the appeal below that the mere surveillance of a private funeral was not sufficient to establish that such surveillance was an official duty of the F. B. I., despite the conclusory statement of the F. B. I. agent that it was official business. This argument was predicated upon the fact that the F. B. I.'s jurisdiction is limited not only to investigation of Federal crimes but only to certain Federal crimes, specifically within their jurisdiction. The absence of any evidence at the trial to show that the surveillance was within rather than without the scope of their jurisdiction rendered the Government's case fatally incomplete because of the statutory requirement that the assault must be committed while the agent was "engaged in or on account of the performance of his official duties" (See Point II, *infra*).

At the trial, one Hector Manguel, a Government witness whose credibility was a major issue in the case, testified in substance that he witnessed the assault and that all of the petitioners were participants in the assault. On cross-examination he stated that he was a "bouncer" in a night-club whose duty it was to "throw roughnecks out" (38a). He was then asked whether that nightclub was in the City of New York. The Government objected to the question upon the ground that it was immaterial, irrelevant and incompetent. The objection was sustained by the Court and consequently defense counsel was unable to ascertain where he was employed (38a). Upon appeal it was urged that this limitation upon cross-examination was prejudicial error in view of this Court's holding in *Alford* v. *U. S.*, 282 U. S. 687 (1930) [See Point III, *infra*].

At the trial, Agent Foley's gun was received in evidence as part of the Government's case, over objection. It was the Government's theory that the gun was pertinent because of the medical testimony that the head injury received by the agent might have been caused by a hard, sharp object such as a gun (25a). The same testimony, however, also established the equal possibility that the injury could have been caused by the agent's striking his head against the base of a statue in the churchyard near which the agent fell (26a; 39a) [See Point IV, *infra*].

At the trial various newspaper articles were received for identification. These articles had been published while the case was on trial. In substance, they linked the petitioners to the notorious Mafia and described them as "toughs" and "hoodlums" who assaulted and pistol-whipped the agent (62a-67a).

It appears that several of the jurors had read the articles despite the Court's admonition not to do so (3a; 24a). Moreover, after one juror had acknowledged reading such an article, a second article subsequently appeared in the paper. This article was again called to the Court's attention and the Court again inquired of the jurors whether they had read it. Two jurors acknowledged that they had read the article, thereby directly disregarding the trial judge's admonition following the first incident the day before (24a). Motions for mistrials were uniformly denied (4a, 6a, 21a-23a, 24a) [See Point V, *infra*].

At the trial, it appeared that several of the Government witnesses might have difficulty identifying any of the participants in the alleged assault. Accordingly, on direct examination these witnesses were permitted, over objection, to examine photographs before pointing out any of the petitioners as participants in the assault (16a, 18a; 28a-29a). Intertwined with the problem thus presented was the

issue of the manner in which the witnesses were allowed to refresh and rehabilitate their recollection (See Point VI, *infra*).

During the course of the prosecutor's summation he made reference to the failure of the petitioners to call one Carmine Lombardozzi, a person allegedly present during the altercation, and described in the newspaper articles as a "Mafia chieftain" (64a) who had refused to testify before a Grand Jury about the assault and was sentenced to a thirty (30) day jail sentence later set aside by the Court of Appeals (62a). Objection was made to the remarks of the prosecutor (45a-46a). The Court thereupon instructed the jury that either side had the right to call witnesses, but that the defendants were not obligated to do so (49a-50a) [See Point VII, *infra*].

Other pertinent facts are referred to, whenever specially applicable, in the arguments hereinafter set forth.

All of the arguments raised upon the appeal are discussed in the opinion of the Court of Appeals.

F. *Basis for Jurisdiction in the United States District Court.*

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crime charged was a violation of a federal law, to wit: 18 U. S. C. §111, allegedly committed within the Eastern District of New York.

G. *Argument Amplifying the Reasons Relied on for the Allowance of the Writ*

POINT I

In a prosecution under §111 of Title 18, United States Code, the Government must prove as a fact that the defendant knew that the person assaulted was a federal agent. The failure of the Government to prove scienter requires a judgment of acquittal.

At the very outset, it should be noted that the point raised herein has produced conflicting decisions in various Circuits. Indeed, this was recognized by the Court below in its opinion. As the Court below stated:

> "Appellants rely primarily on a statement in *Pettibone* v. *United States*, 148 U. S. 197, 205 (1892), wherein Mr. Chief Justice Fuller said, 'It is the official character that creates the offense and scienter is necessary.' In *United States* v. *Taylor*, 57 Fed. 392, 393 (C. C. E. D. Va. 1893), a district judge dismissed indictments which failed to allege 'knowing that they were officers of the United States, engaged in performing duties imposed by laws of the United States' and said in a case involving an assault upon a federal officer, 'In such cases the scienter is an essential ingredient of the offense.' In *Hargett* v. *United States*, 183 F. 2d 859 (5 Cir. 1950), the Fifth Circuit took cognizance of *Pettibone*, *Taylor* and also reviewed cases in the Fifth, Sixth, Seventh and Eighth Circuits,* all holding on the facts therein that scienter was a necessary ingredient of crimes against federal officers. . . ."

"* *Odom* v. *United States*, 116 F. 2d 996 (5th Cir.), *rev'd* 313 U. S. 544 (1941); *Sparks* v. *United States*, 90 F. 2d 31 (6th Cir. 1937); *Chiaravalloti* v. *United States*, 60 F. 2d 192 (7th Cir. 1932); *Walker* v. *United States*, 93 F. 2d 792 (8th Cir. 1938)."

After analyzing the conflicting opinions in other Circuits, the Court below pointed out:

> "However, in *Bennett* v. *United States*, 285 F. 2d 567 (5 Cir. 1960), *cert. denied*, 366 U. S. 911 (1961), the Fifth Circuit directly answered the argument that 'knowledge of the official character of the person assaulted is necessary to constitute the crime of which he was charged,' by saying that it was not persuaded 'that the indictment was insufficient because it failed to include the element of scienter.'"

The Court below, choosing between the alternatives thus presented, concluded, for the first time in the Second Circuit:

> "The reasoning in *McNabb* and *Bennett* is far more persuasive as to the proper construction to be placed upon section 111 than those cases which write the element of scienter into a statute which does not contain this requirement."

As matters now stand, the Fifth Circuit has within its own jurisdiction apparently conflicting decisions on the point. (See *Gay* v. *United States*, 12 F. 2d 433, 444; *Hargett* v. *United States*, 183 F. 2d 859, 864-865; *Carter* v. *United States*, 231 F. 2d 232, 235; *Hall* v. *United States*, 235 F. 2d 249; *Bennett* v. *United States*, 285 F. 2d 567. With the exception of the *Bennett* case, all of these cases were Fifth Circuit decisions holding that knowledge was an essential ingredient of the crime charged. The *Bennett* case, the most recent case in the Fifth Circuit, apparently holds to the contrary, although the holding appears to be dicta.)

The Sixth, Seventh and Eighth Circuits have each held that scienter was a necessary ingredient in cases of crimes alleged to have been committed against Federal officers. The Second Circuit has now held to the contrary.

(See *Sparks* v. *United States*, 90 F. 2d 61; *Chiaravalotti* v. *United States*, 60 F. 2d 192; *Walker* v. *United States*, 93 F. 2d 792, respectively.)

It is our position herein that the better view—which has apparently been sanctioned by this Court in *Pettibone* v. *United States*, 148 U. S. 197 (1892)—is that knowledge must be an essential ingredient of the crime charged.

In the case at bar, motions for judgments of acquittal were made at the end of the Government's case upon the ground that no knowledge had been shown on the part of the petitioners of the official status of the assaulted agent. These motions were denied. In the trial court's charge to the jury, he stated (57a):*

> "The Government is not required to prove that the defendants or any of them had knowledge that Foley was so employed and engaged. . . ."

Exceptions to this portion of the charge were duly taken by petitioners. The Court was requested to charge that knowledge must be shown (61a). The Court refused this request.

Our argument herein proceeds from the reasoning of the United States Supreme Court in *Pettibone* v. *U. S.*, 148 U. S. 197 (1892). There the Court construed an indictment under §5399 of the Revised Statutes (now 18 U. S. C. A. 1503) which deals with corruptly influencing, intimidating or impeding a witness or officer in a United States Court. Mr. Chief Justice Fuller pointed out (148 U. S. 203, 205, 206, 207):

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* References in parentheses are to the appendix filed in the Court of Appeals.

"The Courts of the United States have no jurisdiction over offences not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offences are designated.

* * * * *

"In United States v. Bittinger, 15 Am. L. Reg. (N. S.) 49, it was held that a person is a witness under section 5399 of the Revised Statutes who is designated as such, either by the issue of a subpoena or by the endorsement of his name on the complaint, but that before any one could be said to have endeavored to corruptly influence a witness under that section, he must have known that the witness had been properly designated as such. United States v. Kee, 39 Fed. Rep. 603.

"In United States v. Keen, 5 Mason 453, it was ruled by Mr. Justice Story and Judge Davis, that it was no defence to an indictment for forcibly obstructing or impeding an officer of the customs in the discharge of his duty that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duty, *if he knew the officer to be so engaged.* (Italics supplied.)

"In cases of that sort it is the official character that creates the offense and the scienter is necessary. King v. Osmer, 5 East 304; King v. Everett, 8 B. & C. 114; State v. Carpenter, 54 Vermont 551; State v. Burt, 25 Vermont 373; State v. Maloney, 12 R. I. 251; State v. Downer, 8 Vermont 424, 429; Commonwealth v. Israel, 4 Leigh 675; Yates v. People, 32 N. Y. 509; Commonwealth v. Kirby, 2 Cus. 577; State v. Hilton, 26 Missouri 199; State v. Smith, 11 Oregon 205; Horan v. State, 7 Tax. App. 183; Duncan v. State, 7 Humph. 148;

State v. Hailey, 2 Strobh. (Law) 73; State v. Beasom, 40 N. H. 367."

* * * * *

"It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."

* * * * *

"Undoubtedly it is a condition of penal laws that ignorance of them constitutes no defence to an indictment for their violation, but that rule has no application here. The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when justice is being administered. Unless that fact exists, the statutory offence cannot be committed; and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking. *It is enough if the thing is done which the statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise.*" (Italics supplied.)

See, also, *Walker* v. *U. S.*, 93 F. 2d 792, 795 (8 Cir., 1938).

The analogy to the statute at bar is pertinent and obvious. The Government has no interest in an assault as such

(*Ladner* v. *U. S.*, 358 U. S. 169, 175-6 [1958]). Just as the Government, in *Pettibone*, was held to have no interest in the alleged interference with a witness unless it was shown that the defendant knew of the witness' status as a witness in a Federal Court, so here, it must be shown that a defendant knew the person assaulted was a Federal Agent. ***Absent such knowledge, a defendant could not know the person assaulted was acting in behalf of the Government.***

The underlying rationale of *Pettibone* has been applied in cases analogous to the case at bar.

In *U. S.* v. *Page*, 277 Fed. 459, 460 (D. C. W. Va. 1921), Judge McDowell sustained a demurrer to an indictment charging an assault upon a prohibition agent engaged in the performance of his official duties, holding:

> "Without considering any other question the first count of the indictment seems to me to be fatally defective in that there is a failing to allege that the defendants knew that the persons assaulted were prohibition officers. *Pettibone* v. *U. S.*, 148 U. S. 197, 205, 13 Sup. Ct. 542, 37 L. Ed. 419; *U. S.* v. *Taylor* (c. c.), 57 Fed. 391."

In *Gay* v. *U. S.*, 12 F. 2d 433, the Court said:

> "It is not to be denied that the indictment in this case is faulty, and that it ought to have alleged in direct, positive terms that the defendant at the time he made the assault knew that Ryals was a prohibition agent."

In *U. S.* v. *Taylor*, 57 Fed. 392, 393, the Court dismissed an indictment which failed to allege an essential element of the crime, to wit: that defendants knew that the persons they assaulted were Federal officers engaged in performing their duties. Hughes, J. held:

> "To assault an officer of the United States while happening to be engaged in performing some duty enjoined upon him by federal statute is only a common-law offense; and it becomes a statutory offense only when the assailant knows that the assailed is an officer of the United States, and makes the assault for the purpose of obstructing the officer in the discharge of duty imposed by laws of the United States. In such cases the scienter is an essential ingredient of the offense."

For a review of the authorities holding, in accordance with *Pettibone*, that knowledge is an essential element, see *Hargett* v. *U. S.*, 183 F. 2d 859, 864-865.

From all of the foregoing, it is clear that the weight of authority holds that scienter is a necessary ingredient of the crime charged.

The Government having failed to prove that petitioners knew that Foley was (1) a Federal Officer, and (2) acting in the course of his official duties, the motion for judgments of acquittal should have been granted.

It is therefore respectfully submitted that the Second Circuit has rendered a decision in conflict with decisions of other courts of appeal on the same matter and has decided a Federal question in a way in conflict with applicable decisions of this Court (*Pettibone* v. *U. S.*, *supra*).

Accordingly, it is respectfully urged that this Court grant the petition for certiorari (Rule 19; *U. S.* v. *Muniz*, 375 U. S. 150 [1963]; *Egan* v. *City of Aurora, Illinois*, 365 U. S. 514 [1961]).

POINT II

The prosecution failed to establish that the agent was "engaged in or on account of the performance of his official duties", as required under §111.

It appears from the record below that the F. B. I. agent alleged to have been assaulted testified that he and other agents were sent by a superior officer "to cover the funeral of Carmello Lombardozzi . . . at the Immaculate Heart of Mary Church in Brooklyn, New York" (8a; 9a). He carried with him a briefcase which contained a concealed "robot" camera designed to take photographs clandestinely (10a-11a). He also "observed the individuals attending the funeral" (10a). He further testified that he was thereby engaged in official business of the F. B. I. (11a).

Thus, apart from the agent's conclusory statement that he was engaged in official business, the record below indicates only that he went to the funeral to observe and photograph events occurring there.

Under the statute at bar, the crime charged is not made out merely by a showing that an F. B. I. agent was assaulted. The Government is required to prove, among other things, that the agent was assaulted "while engaged in or on account of the performance of his official duties". (Title 18, U. S. C. A., §111.)

Against this contention, on appeal the Second Circuit concluded that a question of fact was presented to the jury, whose verdict "was determinative". The question does not appear to have been previously decided in any other Circuit.

It is our position here that *as a matter of law* there was no evidence to establish that the alleged assault occurred while the agent was "engaged in or on account of the performance of his official duties". As indicated, the proof was

only that an F. B. I. agent was sent to the funeral to conduct a photographic and visual surveillance of events occurring there. The fact that the F. B. I. agent stated that it was official business did not make it so, for the reasons hereinafter set forth.

The Federal Bureau of Investigation is essentially an investigative agency. Its official duty and jurisdiction is not unlimited. It is confined initially and basically to the investigation of crimes against the United States. It has no duty or authority in purely local matters. Moreover, even its jurisdiction in Federal matters is limited by Congress to certain prescribed areas of criminal conduct leaving other areas—*e.g.*, Internal Revenue frauds, narcotic law violations, immigration offenses—to other investigative agencies of the Government. (For a detailed discussion of the legislative history and authority of the F. B. I., see *U. S.* v. *Stark*, 131 F. Supp. 190, 194-197.)

Thus, the qualifying and restrictive language of §111 becomes a matter of substance evincing the Congressional intent to distinguish between situations in which assaults should be prosecuted by the Federal Government and those which should be left to State Courts.

An illustration is found in *Whipp* v. *U. S.*, 47 F. 2d 496 (C. C. A. 6th, 1931). There, a defendant assaulted an Inspector in the United States Bureau of Animal Industry who was seeking to conduct a tuberculin test upon certain cattle in Ohio. It appears from the Court's opinion that the Inspector was acting in cooperation with the Ohio authorities in the mistaken belief that he was authorized by law so to do. The Court, examining the extent of the Government's duties under the applicable statutes, concluded that there was inadequate proof that the Inspector was acting in performance of his federal duties. The Court held, at page 497:

> "... the particular act must nevertheless be responsive to some equally particular requirement of federal authority, in order to make such act one in the performance of a federal duty."

In the final analysis, the issue becomes a mixed question of fact and law. The Government must prove as a fact, by appropriate evidence, that the acts of the assaultee, bribee, or other official were done while engaged in an official duty as a matter of law. Indeed, the indictment itself must properly and sufficiently allege the acts from which the official duty is derived. As indicated in *Kellerman* v. *U. S.*, 295 Fed. 796 (C. C. A. 3rd, 1924):

> "... the office or the official function of the one to whom the bribe was offered, as a person within the class described by the statute, are facts which must be alleged in the indictment and proved upon the trial."

See also *Hlabse* v. *U. S.*, 20 F. 2d 482 (6th Cir., 1927); *Cooper* v. *U. S.*, 299 Fed. 483 (3rd Cir., 1924).

Nowhere is there any evidence of what connection, if any, existed between this assignment, carried out by the agent, and the official functions of the F. B. I. On its face, it amounts to nothing more than an investigation of undetermined purport. As previously indicated, however, the F. B. I.'s investigative powers are limited firstly to matters involving federal crimes and, secondly, only to certain crimes from among all federal crimes. There is absolutely nothing in the record to establish whether the contemplated surveillance related to a federal crime or for that matter, to any crime. The fact that the agent was following orders from a superior officer does not, *vis-à-vis* these petitioners, give rise to an inference that he was performing "official" duties.

Was the surveillance responsive to some "particular requirement of federal authority" as mandated in the *Whipp* case, *supra?* If so, to what? Were the agents acting under a misapprehension as to their duties as defined by law? If the Government had, by appropriate evidence, shown the actual purpose of the surveillance, would the purpose thus shown have brought the case within or without the statute? The answers to these questions are *dehors* the record. And therein lies the difficulty with the proof adduced below. It was incumbent upon the Government to establish every essential element of the crime charged beyond a reasonable doubt. The fact that the Government employee states, *as a conclusion*, that he was acting in performance of his duty, or even that he was acting under orders from a superior officer, does not satisfy the burden of proof which the Government is required to meet.

The failure to do so—as in the instant case—required the granting of the motions for judgments of acquittal.

POINT III

The Trial Court committed prejudicial error in refusing to allow cross-examination of a key prosecution witness as to his place of employment.

Hector Mangual was called as a witness by the Government. His extensive testimony, which encompasses 167 pages of the trial record (596-793), was of a highly damaging nature. His allegedly eye-witness testimony purported to implicate all appellants as the assailants. Consequently his credibility was a critical factor in the entire case.

At the very threshold of his cross-examination, he was questioned with respect to his place of employment. After stating that he was a "bouncer" in a night club, whose duty

it was to "throw roughnecks out" (38a), he was asked whether that night club was in the City of New York. Objection by the Government to "this line of questioning as being immaterial, irrelevant and incompetent" was sustained by the Court (38a).

It was urged upon the appeal that this was prejudicial error in the light of the holding of this Court in *Alford* v. *U. S.*, 282 U. S. 687 (1930). In that case, it was held to be prejudicial error—requiring a reversal of the conviction—for the trial court to refuse to allow cross-examination of a prosecution witness as to his place of residence. Mr. Justice Stone, writing for the Court, said at pages 691-693, 694:

> "Cross-examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, cf. Khan v. Zemansky, 59 Cal. App. 324, 327ff.; 3 Wigmore, Evidence (2d ed.) §1368 I. (1) (b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, Kirschner v. State, 9 Wis. 140; Wilbur v. Flood, 16 Mich. 40; Hollingsworth v. State, 53 Ark. 387; People v. White, 251 Ill. 67, 72ff.; Wallace v. State, 41 Fla. 547, 574ff.; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. Tla-Koo-Yel-Lee v. United States, 167 U. S. 274; King v. United States, 112 Fed. 988; Farkas v. United States, 2 F. (2d) 644, see Furlong v. United States, 10 F. (2d) 492, 494.
>
> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that

reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp v. Wing, 72 Vt. 334, 340; Martin v. Elden, 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. Tla-Koo-Yel-Lee v. United States, supra; King v. United States, supra; People v. Moore, 96 App. Div. 56, affirmed without opinion, 181 N. Y. 524; cf. People v. Becker, 210 N. Y. 274. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. Nailor v. Williams, 8 Wall. 107, 109; see People v. Stevenson, 103 Cal. App. 82; cf. Braisfield v. United States, 272 U. S. 448. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. Nailor v. Williams, supra.

"The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. The question, 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential

step in identifying the witness with his environment, to which cross-examination may always be directed. State v. Pugsley, 75 Ia. 742; State v. Fong Loon, 25 Idâ. 248, 255ff.; Wallace v. State, supra; Wilbur v. Flood, supra; 5 Jones, Evidence (2d ed.) §2366."

* * * * *

"The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. Storm v. United States, 94 U. S. 76, 85; Rea v. Missouri, 17 Wall. 532, 542-543; Blitz v. United States, 153 U. S. 308, 312. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. Great Western Turnpike Co. v. Loomis, 32 N. Y. 127, 132; Wallace v. State, supra; 5 Jones, Evidence (2d ed.) §2316. But no such case is presented here. The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."

At bar, the disallowed question related to the witness' place of employment rather than to his place of residence, as in *Alford*. This, we submit, is a distinction without a difference in terms of legal relevancy. The facts sought to be elicited are the same in either case. One is the legal twin of the other. If, as stated in *Alford* at page

691, "The jury may interpret his testimony in the light reflected upon it by knowledge of his environment," it would certainly follow that "environment" includes a man's place of employment as well as his place of abode. It is ancient learning that a man's veracity may be tested in terms of his place of work as well as his place of abode.

The disallowed question "on its face, without any such declaration of purpose . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed" (*Alford* at page 691).

The Court below, however—itself relying on the *Alford* case—took the view that the cutting off of the inquiry was a matter of the trial court's discretion. This conclusion was based upon the statement in its opinion that "Even on appeal appellants have not demonstrated the materiality or relevance of this information". This view is directly contrary to that expressly taken by this Court in *Alford*.

The matter, however, did not end there. Not only were petitioners unduly hampered in their attempts to "place the witness in his proper setting," but the prosecutor took full advantage of the situation in his summation. After acknowledging that Mangual was not "an upstanding citizen in the sense of being a banker" (51a), the prosecutor went on to extol his veracity with the pointed encomium (51a):

> "He is a tough guy and a rough guy, a diamond in the rough, if you want to call him that. *But he is an honest man and a fearless one.*"

Thus, while petitioners were effectively precluded from inquiring into the circumstances by which Mangual was not "an upstanding citizen", the Government was allowed to wreak havoc upon them by proclaiming Mangual's "hon-

esty," and, at the same time, argue forcefully that he couldn't be shaken on cross-examination (50a).

Such an approach completely defeated an essential function of appellants' cross-examination, and further, affirmatively produced the very prejudicial result which this Court took great pains to guard against by its opinion in the *Alford* case.

POINT IV

It was prejudicial error to allow Agent Foley's gun to be received in evidence.

Agent Foley testified that prior to the assault upon him he was in possession of his gun (14a). During the altercation he somehow lost possession of it (12a). Shortly after the altercation was over a gun was located by another agent inside the church and was handed to him by a person other than one of the petitioners (8a).

None of the witnesses saw the gun in the possession of any of the petitioners. None of the witnesses stated that the gun was used in the course of the assault. To the contrary, the tenor of their testimony indicated that the assault was committed by the use of hands and feet.

An attempt was made by the prosecutor to establish that the injury to Foley's head was caused by the gun. Toward that end, hypothetical questions were put to the examining physician, Dr. Ray. In response the doctor could do no more than state that a sharp, hard object might have caused the head injury (25a). In this regard he speculated that such object might have been either the gun (27a) or the base of one of the statues in the Churchyard (26a). There was testimony by the Government's witnesses that Agent Foley fell near the statue during the assault (39a). There

was no evidence that the gun itself had blood or human hair on it when it was recovered so as to allow an inference of its use in the assault. It was received in evidence over objection (12a-14a). Motions for a mistrial were denied (14a-15a).

The indictment under which petitioners were convicted contained no charges as to unlawful taking or possession or use of a gun. Thus, unless the evidence demonstrated that the gun had probative value with respect to the assault charged in the indictment, its reception in evidence constituted prejudicial error. (*Giordano* v. *U. S.*, 185 F. 2d 524, 6 Cir. 1950; *Brubaker* v. *U. S.*, 183 F. 2d 894, 6 Cir. 1950; *Pearson* v. *U. S.*, 192 F. 2d 681, 6 Cir. 1951.)

In these circumstances, the gun was of no assistance whatsoever to the jury in deciding the issues under the indictment. As stated in *Brubaker*, *supra*, at 183 F. 2d 898,

> "The receipt of this evidence constituted error and error so highly prejudicial that no course is open to us except to reverse the judgment and remand the cause to the District Court for a new trial."

The prejudicial error of the gun's reception into evidence was compounded by two additional factors. It was the subject of frequent inflammatory comment by the prosecutor in his summation (39a-40a; 41a; 41a; 41a-43a; 52a; 52a-53a).

The following is an illustrative sampling:

> "He was responsible, he and the other men sitting in Court today were responsible for the gun being inside The Church" (40a).

> "Do you believe that John Patrick Foley took his own gun, smashed himself in the head with it . . . ?" (52a).

In view of the absence of evidence that the gun was in the possession of petitioners or was used by them during the assault, its reception in evidence was error. The prejudicial nature of that error was woven into the entire trial from its early introduction to its delivery into the jury room following the charge of the court.

Coupled to all of this is the not insignificant fact that on the second day of trial two jurors acknowledged to the Court that they had read a newspaper article erroneously referring to a pistol-whipping allegedly received by Foley (21a-24a). The reading of this article was in direct violation of the Court's admonition against reading such article. The admonition was given the previous day when a similar incident arose (1a-2a; 2a-6a).

A new trial is required.

POINT V

The Trial Court erred in denying motions for a mistrial predicated upon inflammatory and untrue newspaper articles admittedly read by some of the jurors.

At the very inception of the trial, articles concerning the case began to appear in newspapers of wide general circulation in the City of New York. One such article appeared in the New York Daily News on November 13, 1963 (Defendant's Exhibit A for Identification; 2a).

In brief, the article commenced with the bold-face heading, "Begin Trial of Mafia Kin for F. B. I. Stomping." Having thus set the stage in an obviously inflammatory tone, the article went on to name the defendants and point out that one of their brothers "refused to testify before a Grand Jury about the assault and was sentenced to thirty days."

The article referred to the petitioners as "four brothers and two nephews of Mafia Hood Carmine Lombardozzi."

At the request of defense counsel (3a), the Court inquired of the jurors whether any of them had read any article about the case. One juror acknowledged that he had read part of it. He stated in response to the Court's questions that he would not be influenced by it or prevented from being impartial. The Court thereupon reminded the jurors about its prior admonition against reading such articles (5a). Defense motions for a mistrial were denied (4a, 6a).

Thus the trial began with at least one juror in possession of derogatory information that Carmine Lombardozzi, a "Mafia Hood" was a blood relative of the petitioners and had been sent to jail for refusing to testify about the assault.

There is, however, much more than the foregoing incident. The issue at bar acquires increased significance because of what developed thereafter. On the very next day, the New York Daily News, continuing its publicity, printed another article containing false and inflammatory assertions that Agent Foley had been pistol-whipped by appellants (Defendant's Exhibit B for Identification; 24a), and that appellants were brothers and nephews of "Mafia Chieftain" Carmine Lombardozzi.

The article was called to the Court's attention and again counsel requested the Court to inquire of the jurors whether they had read it.

At this stage it became evident that the Court's prior admonitions had failed of its purpose. (Cf., *Briggs* v. *U. S.*, 221 F. 2d 636.) Two jurors acknowledged that they had read the article (24a).

Thus, aligned with the jurors' verbalized assertions that they would not be affected by the article, was the unspoken but painfully obvious fact that these jurors deliberately disregarded the Court's explicit instruction not to read such articles. Despite the trial Court's efforts to ensure a fair and impartial jury, the net result was reminiscent of instances where judicial banning of salacious literature produced an upsurge of demands for it.

Motions for a mistrial were again made (21a-23a) and again denied with further cautionary instructions (24a).

During the afternoon session, a third article from the New York Journal-American Headlining "6 Toughs on Trial in G-Man Attack", was shown to the court. This article, received as defendants' Exhibit C for Identification (331) unequivocally pointed out the guilt of appellants in the following language:

> "Apalachin delegate Carmine Lombardozzi's four brothers and two nephews are having the sort of summit meeting hoodlums don't like—a conference with a Federal judge and jury.
>
> "The six tough relatives of the notorious Mafia mobster are on trial on charges of beating up FBI Agent John Patrick Foley.
>
> "The boys worked him over after they spotted the G-man snooping at the funeral of Carmine's father, Carmello.
>
> "They didn't like it—so whamo."

With respect to the last quoted article, the trial court made no inquiry of the jurors.

It was against this opening backdrop that the case was tried. Three jurors were possessed of choice—but inaccu-

rate—bits of gossip, the tenor of which was suffused with direct references to appellants' connection with the notorious Mafia and its "Chieftain" Carmine Lombardozzi. An added factor was the wholly untrue reference to the pistol-whipping.

Certainly the Government would not be allowed to inject evidence of a "Mafia" or a "Mafia Chieftain" at the trial. Nor did they in fact offer evidence—for there was none—that Agent Foley had been pistol whipped. Yet the Government tried to establish by the gun and the speculative testimony of Dr. Ray (Point Four, *supra*) that a pistol whipping had in fact occurred.

The dubious nature of the proof at the trial on this latter aspect highlights the prejudicial nature of these news articles. They gave complete extra-judicial credence to the Government's witnesses by implanting in the minds of at least three jurors the positive but unproven assertion that appellants were "hoodlums" and "toughs" whose testimony was not worthy of belief.

As was stated in *Marshall v. U. S.*, 360 U. S. 310, 312-313 (1958):

> "The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. Michelson v. United States, 335 U. S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures."

There, as here, despite the protestations of the jurors that the news accounts would not prejudice them, the Supreme Court reversed the conviction because the news articles contained inflammatory and prejudicial allegations not capable of being received in evidence at the trial. Here,

even the Court's strict admonitions were immediately disregarded by some of the jurors.

In *Krogman* v. *U. S.*, 225 F. 2d 220, 228 (C. C. A. 6th, 1955) the Court pointed out:

> "Generally, an incorrect, unfavorable report of the evidence . . . which comes to the attention of a juror or jurors during the pendency of the trial raises a rebuttable presumption that the rights of the defendant have been prejudiced."

Undoubtedly, in the final analysis, "each case must turn on its special facts." (*Marshall* v. *U. S.*, *supra*, at page 312.) We respectfully submit that in the total setting of this case, it was an abuse of discretion to insist on continuing the trial. Discretion required the granting of the motions for a mistrial.

POINT VI

The direct examination of witnesses Ferraioli and Ramsey as conducted by the Government and sanctioned by the Court was prejudicial to the petitioners and constituted reversible error.

The first witness we come to in order of appearance is Viagio Ferraioli. He commenced his testimony on November 13, 1963. He testified to driving a funeral car to the Church that was the site of the assault. He testified that he transported one of the family to the Church, to wit: Camillo Lombardozzi (15a). He then stated he drove to the cemetery and identified the defendant George Lombardozzi as one of his passengers (15a-16a).

It is at this point in his testimony that photographs were employed (15a-16a). Thereafter he testified that one Danny

Marino also rode in his car to the cemetery and made a certain remark (17a). The witness was then called from the stand and asked to select Danny Marino from amongst the defendants (17a). In the course of his descent from the stand the record reveals that he:

> "has viewed a photograph in front of him before stepping down to make an identification after looking at this photograph" (18a).

It is our contention that this procedure of having the witness look at a photograph before making an identification was highly improper and constituted reversible error. The record at this point is clear there was no recollection in need of refreshment. Ferraioli testified without hesitation or qualification.

As the Fifth Circuit Court pointed out in *N. L. R. B.* v. *Hudson Pulp & Paper Corp.*, 273 F. 2d 660 (5th Cir., 1960), at page 665:

> "Resort to the use of an extra-judicial statement, previously made, for the purpose of refreshing the recollection of a witness, can be had only if the witness does not recall to mind the matters referred to in the prior writing. Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 7 S. Ct. 118, 30 L. Ed. 299; 98 C. J. S. Witnesses §358, p. 87; 58 Am. Jur. 324, Witnesses, §580."

The applicability of the language and the principle of that case to the case at bar is apparent. The picture here was to serve the same function as the statement in the *Hudson* case. The recollection of Ferraioli up to that point was clear.

The use of notes in the same way that the instant photograph was employed brought a strenuous condemnation by the Circuit Court in the case of *N. L. R. B.* v. *Federal Dairy*

Co., Inc., 297 F. 2d 487, when, at page 489, the Court stated as follows:

> "... should not refresh his recollection until he has been examined without leading, if it is direct examination, and has testified that his recollection is exhausted. Prerequisites to prompting a witness, such as exhaustion of memory, are so axiomatic that they are rarely referred to except in passing. See Commonwealth v. Pike, 1949, 32 Mass. 335, 339-340, 86 N. E. 2d 519; cf. Moody v. Rowell, 1835, 17 Pick. 490, 34 Mass. 490, 498. But, of more fundamental moment, we must express disapproval of the advocated practice of preparing a written account for the purpose of testifying under the principle that 'anything' may be used to refresh recollection. This is, of course, not to say that when recollection is exhausted a witness may not be shown a paper. But he should not bring into court specially prepared extensive testimonial notes to use over objection instead of the original records. One may well ask why there should be strictures against leading questions, if a witness is free to have a prepared answer before him in any event."

Since it is quite apparent that there was no need to refresh the witness' recollection by any of the conventional methods, it follows that the only purpose for the use of the photograph was the universally condemned one of improperly suggesting a hoped for line of testimony. (See Vol. III, 3rd Ed., *Wigmore on Evidence*; *Rosenthal* v. *U. S.*, 248 Fed. 684 (8th Cir., 1918); *U. S.* v. *Riccardi*, 174 F. 2d 883.)

This same unwarranted procedure was followed with respect to the witness Margaret Ramsey. All that differed was the method. The witness Ramsey identified three men

as committing the assault, to wit: Daniel Marino, Michael Zampella, and George Lombardozzi (27a). At this point the Government, apparently dissatisfied with the identification of only three of the defendants, tried to show the witness to be frightened! (28a). This was thwarted by the court upon objection by counsel (28a). Thereafter the Government had certain photographs marked for identification and had the witness examine same (28a-29a). Then the witness was questioned concerning a certain statement she made to the F. B. I. (29a). She was then questioned concerning the identification of the individuals depicted on the photographs in the said statement (29a, 30a, 31a).

This was all done over repeated objection by the attorneys for both defendants.

As to this witness, there was no testimony that her 'recollection is exhausted'. This is a required condition before refreshing can commence. (*N. L. R. B.* v. *Fed. Dairy Company, Inc., supra.*)

When the avenue of showing the witness to be frightened was blocked, the Government plunged into the process of refreshing a far from spent recollection. Not only was the previous procedure of a photograph identification utilized, but now a new touch was added—the names of the parties were on the back of the photos (28a-29a). This was further compounded by two additional ingredients, namely the allusion to the prior statement to the F. B. I. (29a) and the use of leading questions (31a: 30a).

This is certainly just the type of procedure that was so plainly condemned by the Court in *N. L. R. B.* v. *Fed. Dairy Company, Inc., supra.* The procedure followed at bar seems to fly in the face of the prohibition of that case.

Perhaps the most disturbing aspect of permitting this procedure is that up to the point where the foregoing

methods of refreshing were employed, the record is completely devoid of any reason or pretext for their employment. Indeed, this is not merely the jaundiced view of counsel; the Court recognized it in thwarting the inquiry concerning possible fear on the part of the witness. The first appearance of any words which by any tortuous reasoning provide any comfort for the Government's position is page 345 (30a-31a) of the transcript. At that particular point the witness used the words "I wasn't sure". Assuming *arguendo*, that this indicated exhaustion of recollection, it was many questions earlier that the Pandora's box was opened to the improper refreshing.

We are cognizant of the Court's reluctance to disturb a verdict due to error in the admission of evidence or examination of a witness unless a patent abuse of discretion is shown (*Beatty* v. *U. S.*, 1953, 4th Cir., 203 F. 2d 652).

Examination of this record, however, reveals that it may be a classic situation for applying the language of this Court in *Krulewich* v. *U. S.*, 336 U. S. 440, 69 S. Ct. 716, 719, 93 L. Ed. 790, when it held that it could not say that:

> "The erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioners."

This was true, as the Court said, because in that particular case:

> "The record persuades us that the jury's task was difficult at best."

Can it be said with complete equanimity that these procedures of improper refreshment employed with witnesses about whom the Government had premonitions of weakness (which were later borne out by the misidentification despite the preparation), when coupled with the other

prejudicial error referred to in this brief, did not tip the scales against the petitioners?

We urge not.

As a general rule, a party cannot impeach a witness whom he introduced either in a civil or criminal case, where such party is not prejudiced by the testimony because of entrapment, hostility or surprise. We will concentrate on the exceptions of hostility and surprise, for this record is devoid of any question of entrapment.

Commencing with witness Ferraioli, it was after defense counsel anticipatorily denied any showing of hostility that the Government raised any contention of hostility on the part of this witness (18a). This witness had, prior to this point, given testimony which covered some 31 typewritten pages. Recourse must be had to this testimony in order to evaluate the witness' attitude. It strains credulity to conclude that anything that transpired up to that point showed that this witness manifested "hostility or prejudice" to the Government. In fact the Court itself never concluded that the witness was hostile (18a). It merely settled for "unwilling" and thereby permitted the impeachment and allusion to the prior statements and the material contained therein. All that the record showed up to the time was a witness whose perception was not of the best, and who did not give testimony as beneficial as might be expected.

In other words, it was a mere disappointment which has been held to be insufficient to constitute surprise and justify impeachment (See *Sneed* v. *U. S.*, 298 Fed. 911). Beyond this it fails on many other scores. It was not by any stretch of the imagination affirmatively harmful; it did not exonerate anybody; it merely raised questions of the witness' credibility. The prosecutor certainly was not prejudiced by it. It merely went to credibility, which is always a question when any witness testifies.

In order for a party to impeach his own witness based on an allegation of surprise there must be a clear showing that the party was completely unaware of what was going to occur and not merely a feigned reaction.

In *Young* v. *U. S.*, 92 F. 2d 200 (5th Cir., 1938), in prohibiting the introduction of certain letters to impeach a witness, the Fifth Circuit stated in effect that the prosecutor had an inkling of what was going to happen. The same result was reached in *Fontaine* v. *Patterson*, 305 F. 2d 124 (5th Cir., 1962). The Government had the same inkling in this case. Ferraioli admitted on cross examination that he had made several prior misidentifications during the course of statements to the F. B. I., *e.g.*, Statement of April 5, 1963, mistake concerning the transportation of defendant Michael Zampello to the Church (18a-19a); stated again on April 12, 1963, that Zampello was in the car with him (19a); stated that he did not know who was in the back of his car (19a); denied seeing anybody involved (19a); denied hearing any conversation (20a); changed his identification (20a); changed his statement (20a).

These are only a few excerpts of the many mis-identifications the witness made within nine days of the occurrence. He changed his identifications within minutes of having made them. Can the Government be said to be surprised by this witness making a mis-identification on the stand? We think they can hardly claim surprise in good faith. We submit that it is apparent to an objective observer that this was a witness whose weakness was anticipated, witnesseth, the use of photos prior to identification. Surprise was feigned to provide an opportunity to examine him concerning the prior statements to the F. B. I. and thereby have the statements act as corroboration for his testimony.

This is exactly the ruse that the courts have condemned. The identical situation was covered by Judge Learned

Hand in *U. S.* v. *Lonardo*, 67 F. 2d 885 (2nd Cir., 1936), at p. 884, when he said:

> "As contradiction of his testimony, given at the trial as a surprise, the earlier statement would indeed have been competent. Putnam v. U. S., 162 U. S. 689, 16 S. Ct. 923, 40 L. Ed. 1118. But it did not for that reason supply the place of his oath, even if it really came as a surprise, which is somewhat doubtful; it was competent only to break the force of what he said, and it left the case without positive testimony. However, by its use the prosecution finally did extract from Hatlen testimony, which taken alone would support the case. This was done under the guise of refreshing his recollection."

We will now devote ourselves to the witness Margaret Ramsey. With this witness the general rule prohibiting impeachment of one's own witness except in the specified exceptional cases was even further abused. For in that instance, the Government did not even go through the pretext of claiming surprise or hostility, but launched into impeachment immediately. The witness answered questions which cover some 10 pages of testimony. During the course of this, she identified three men, namely, Daniel Marino, Michael Zampello and George Lombardozzi as participating in the assault. Then the episode previously referred to occurred, concerning the use of the photographs and the attempt to show the witness as being frightened (28a). Then immediately the Government, by the use of the photos and by reference to a prior statement (29a), had the witness pick out two additional defendants as having participated in the assault, namely John and Camillo Lombardozzi. Not only does the testimony of this witness fail to meet any of the tests required for impeachment, but the Government did not even contend that it did and immediately launched into impeachment over objection.

Certainly nothing contained in this lady's words indicated hostility or prejudice towards the Government. There was no about-face by this witness. The Government was not prejudiced by anything she said. In short, there was no hostility.

As to surprise, her testimony was not really unexpected. It was not affirmatively harmful. It simply did not go as far as the Government would have liked.

But perhaps the most conclusive determination of no hostility or surprise was that made by the trial judge. After cross examination was concluded, the Government recalled the witness for redirect examination. An extensive colloquy took place at the bench between respective counsel (31a-32a). The Government urged that the witness was hostile; the Court after recess rejected this contention (36a-37a). This contention of hostility was rejected after direct and cross-examination was terminated. If the need for impeachment did not exist after direct and cross-examination how could it be said to exist at the inception of the direct examination?

It is interesting to note in passing, that as to both of these witnesses, prior to the employment of the photos, and reference to statements neither of the witnesses affirmatively stated that persons they identified earlier as participants were in fact not present. What one must also not lose sight of in this case is that all of the impeachment took place upon direct examinat' . oy the Government and without the showing of a true need therefor (cf. *U. S. A.* v. *Francis J. DeSisto*, —— F. 2d —— (2nd Cir., 1964)).

The practice employed as to the witness Ramsey was just another example of using the exceptions to impeachment as a ruse to bolster this woman's testimony by reference to prior statements and use of the photographs.

On the question of how the petitioners might have been prejudiced, the Court's attention is once again most respectfully referred to the previously cited quotation from the *Krulewich* case, *supra*.

To put this another way, as was pointed out in the case of *Thomas* v. *U. S.*, 287 F. 2d 527, (5th Cir., 1961), consideration should be given to the Government's case and its strength in determining whether it was prejudicial or not.

We urge that upon an examination of the other contentions raised in this petition, and the witness' testimony generally, one is led inevitably to the conclusion that this unwarranted bolstering of weak witnesses was highly prejudicial.

POINT VII

The prosecuting attorney made improper and inflammatory remarks during his summation which, in the circumstances of this case, were so prejudicial as to require a new trial.

During the course of his summation the prosecutor made the following remarks (45a-46a):

"They are not obliged to bring forward witnesses, you all know that. But the fact remains that they did do so, and look at the quality of what they brought forward.

"And where is Carmine Lombardozzi? Could the Government have brought forward Carmine—

"Mr. Abrams: Your Honor, I object to that, Your Honor.

"The Court: Yes—

"Mr. Abrams: May I—

"The Court: The defendants are not required to bring in any witnesses.

"Mr. Grunewald: Once again, though, I respectfully submit they have a perfect right to do so.

"Mr. Abrams: Your Honor, may I approach the bench with counsel?"

At the ensuing colloquy at the bench, defense counsel pointed out to the Court that Carmine Lombardozzi was in jail and that the prosecutor was fully aware of that fact (47a). This was in effect admitted by the prosecutor (47a). After cautioning the prosecutor not to insist that the defendants should have called Carmine Lombardozzi as a witness (49a), the Court instructed the jury that either side had the right to call witnesses, but that the defendants were not obliged to do so (50a).

The Second Circuit has established, as a general proposition of law, that it is proper in summation for counsel on either side to comment on the failure of the other side to produce witnesses available to it (*U. S. v. Beekman*, 155 F. 2d 580). We urge, however, that this basic rule was not intended to categorically include all cases. More particularly, we urge that the rule cannot be employed as a tactical device to press an unfair advantage inherent in a particular situation.

The person to whom the prosecutor alluded stood in a unique position as a prospective witness for *either side*. Briefly summarized, his relation to the case embraced the following points of reference:

(1) He was a person described in newspaper reports read by three jurors as a "Mafia Chieftain" (see Point Five, *supra*).

(2) He was, respectively, the brother or uncle of the various defendants.

(3) He was, as made known to three jurors, through the newspaper articles, a person who had refused to testify concerning the case then on trial and had been held in contempt of court for that refusal.

(4) He was in jail at the time of the trial.

The prosecutor, of course, knew all this. The prosecutor also knew, as an experienced trial lawyer, that it would have been the height of folly to call him as his own witness. This for the simple reason that he had every right to believe Carmine Lombardozzi would persist in his refusal to testify, thereby casting the Government's case in a bad light.

Conversely, the prosecutor must have also known that, as a practical matter, the defense was faced with a similar problem. If Carmine Lombardozzi were to refuse to testify when called as a defense witness, he would similarly cast the defendants' case in a bad light. Alternatively, if he were to testify, the prosecutor would have a field day on cross-examination with the net result that whether the witness spoke the truth or not, his testimony would be in serious danger of being discredited in the eyes of the jury.

The overall picture, therefore, was that in relation to the case at bar, *Carmine Lombardozzi was a unique "witness" whom neither side dared to call.* The prosecutor was necessarily aware of this, as was defense counsel. The fact is, of course, that neither side actually called him to testify.

As an inexorable practicality, Carmine Lombardozzi was no more "available" to either side than if he were legally barred from testifying. (See, *e.g.*, *Graves* v. *U. S.*, 150 U. S. 118; *Samish* v. *U. S.*, 223 F. 2d 358, 365, 9th Cir. 1955, cert. den., 338 U. S. 860; *Hamburg American Steam Packet Co.* v. *U. S.*, 250 Fed. 747, 2 Cir. 1918, cert. den., 246 U. S. 662.)

The meaning of "availability" with respect to the rule in issue was defined by the Fifth Circuit in *McClanahan* v. *U. S.*, 230 F. 2d 919, cert. den., 352 U. S. 824. The Court said, at 230 F. 2d 926:

> "It has been well said that 'the availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case.'"

Consequently, the prosecutor's demand for an explanation as to the alleged failure to call Carmine Lombardozzi as a witness was not a legitimate argument within the concept of the *Beckman* rule. To the contrary, it was a means of improperly reminding several of the jurors that he was a "Mafia Chieftain" associated by family ties with appellants. It was also a means of recalling to the attention of all the jurors that it was he who, in the mysterious circumstances described by Agent Graves, produced the missing gun (Point Four, *supra*).

We therefore submit that the prosecutor's comment on the failure of the defense to produce Carmine Lombardozzi, when taken in the context of the total atmosphere of this case, was inflammatory and prejudicial.

CONCLUSION

The petition for certiorari should be granted and this Court, in the exercise of its powers, should order that the judgment of conviction be reversed and the indictment dismissed, or a new trial ordered.

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioners

WILLIAM SONENSHINE, Esq.
Of Counsel

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 505—September Term, 1963.

(Argued June 9, 1964 Decided August 4, 1964.)

Docket No. 28783

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, MICHAEL JOSEPH ZAMPELLO, CAMILLO CHARLES LOMBARDOZZI and GEORGE LOMBARDOZZI,

Defendants-Appellants.

Before:

MOORE, SMITH and MARSHALL,

Circuit Judges.

Appeal from a judgment of conviction for an assault upon a federal officer, 18 U. S. C. §111, entered after a jury trial in the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*.

Affirmed.

RAYMOND BERNHARD GRUNEWALD, Assistant United States Attorney (Joseph P. Hoey, United States Attorney for the Eastern District of New York, of counsel), Brooklyn, New York, *for the United States of America.*

WILLIAM SONENSHINE (Evseroff, Newman & Sonenshine, Gustave H. Newman, of counsel), Brooklyn, New York, *for Defendants-Appellants.*

MOORE, *Circuit Judge*:

The five appellants appeal from a judgment of conviction entered upon a jury verdict. The one count indictment charged them with assault upon an agent of the Federal Bureau of Investigation in violation of 18 U. S. C. A. §111. This statute states:

> "§111. Assaulting, resisting, or impeding certain officers or employees.
>
> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both."

Section 1114 includes "any officer or employee of the Federal Bureau of Investigation of the Department of Justice."

Appellants assert as their principal points (1) that proof of knowledge of the official capacity of the person assaulted is an essential element of the crime charged and that the trial court erred in refusing to submit the issue of knowledge to the jury; and (2) that there was no evidence that the agent was "engaged in * * * the performance of his official duties."

The necessity of establishing knowledge as a matter of law was met directly by the trial court in his charge wherein he stated:

"The Government is not required to prove that the defendants or any of them had knowledge that Foley was so employed and engaged . . ."

Appellants rely primarily on a statement in *Pettibone* v. *United States*, 148 U. S. 197, 205 (1892), wherein Mr. Chief Justice Fuller said, "It is the official character that creates the offense and scienter is necessary." In *United States* v. *Taylor*, 57 Fed. 392, 393 (C. C. E. D. Va. 1893), a district judge dismissed indictments which failed to allege "knowing that they were officers of the United States, engaged in performing duties imposed by laws of the United States" and said in a case involving an assault upon a federal officer, "In such cases the scienter is an essential ingredient of the offense." In *Hargett* v. *United States*, 183 F. 2d 859 (5 Cir. 1950), the Fifth Circuit took cognizance of *Pettibone*, *Taylor* and also reviewed cases in the Fifth, Sixth, Seventh and Eighth Circuits,* all holding on the facts therein that scienter was a necessary ingredient of crimes against federal officers. However, in *Bennett* v. *United States*, 285 F. 2d 567 (5 Cir. 1960), *cert. denied*, 366 U. S. 911 (1961), the Fifth Circuit directly answered the argument that "knowledge of the official character of the person assaulted is necessary to constitute the crime of which he was charged," by saying that it was not persuaded "that the indictment was insufficient because it failed to include the element of scienter." The reason advanced for this conclusion was that:

"The statute making criminal such acts as those of which he was convicted does not require that the doer of the act have knowledge that the person who is as-

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* *Odom* v. *United States*, 116 F. 2d 986 (5th Cir.), *rev'd* 313 U. S. 544 (1941); *Sparks* v. *United States*, 90 F. 2d 61 (6th Cir. 1937); *Chiaravallot* v. *United States*, 60 F. 2d 192 (7th Cir. 1932); *Walker* v. *United States*, 93 F. 2d 792 (8th Cir. 1938).

> saulted, resisted, opposed, impeded, intimidated, or interfered with is a federal officer. It merely requires that the act condemned be done in order to establish a violation of the statute, and the provisions of the section apply to 'whoever' does the act, whether he does it with knowledge of the character of the person whom he acts against and whatever his intent in so acting."

The court also relied upon the opinion in *McNabb* v. *United States*, 123 F. 2d 848, 854 (6th Cir.), *rev'd on other grounds*, 318 U. S. 332 (1942), *certiorari denied after retrial*, 323 U. S. 771 (1944), in part, as follows:

> "In the language of the statute quoted in excerpt, no exemption is expressly made of a killer who does not know that he is killing a federal officer of a class covered by the statute. Exemption may not be implied. The words and the intent of the statute are clear beyond the necessity for any canonical construction. The statute says, 'whoever shall kill,' not 'whoever shall kill with knowledge that he is killing' a federal officer of an enumerated class, shall be punished."

Many statutes creating crimes contain such requirements as "knowingly," "with knowledge," "intentionally" and "with intent." No such prerequisite has been written by Congress into section 111 although it could easily have made knowledge an essential ingredient. The meager legislative history suggests that in section 111 Congress merely sought to provide a federal forum for the trial of cases involving various offenses against federal officers in the performance of official duties. See *Ladner* v. *United States*, 358 U. S. 169, 174-77 (1958). The courts should not by judicial legislation change the statute by adding, in effect,

the words "with knowledge that such person is a federal officer." The reasoning in *McNabb* and *Bonnett* is far more persuasive as to the proper construction to be placed upon section 111 than those cases which write the element of scienter into a statute which does not contain this requirement.

Appellants attack the sufficiency of the evidence that agent Foley was assaulted while engaged in the performance of his official duties. The record clearly establishes the agent's assignment by his superiors to be present at the funeral of Carmello Lombardozzi and to conduct a photographic and visual surveillance of such events as might there occur and of such persons present as might be the subjects of federal investigation. While so engaged, the agent was assaulted by appellants in front of the Church of the Immaculate Heart of Mary in Brooklyn, New York. The trial court in his charge fairly presented the factual question of whether the agent was engaged in official duty. The jury's verdict was determinative.

During cross-examination appellants sought to elicit the place of employment of an important Government witness. The trial court allowed extensive cross-examination but sustained an objection to a question seeking to ascertain whether the night club in which the witness was working as a bouncer was in New York City. Even on appeal appellants have not demonstrated the materiality or relevance of this information. *Alford* v. *United States*, 282 U. S. 687 (1931), supports the discretion of the trial court in deciding how far afield cross-examination should go. See *United States* v. *Rich*, 262 F. 2d 415 (2 Cir. 1959).

Agent Foley's gun was received in evidence as the instrument used to inflict the serious skull fracture suffered by him. The gun was not unrelated to the crime and was not introduced solely to create prejudice but rather to show

how such an injury could have been caused. Medical testimony was offered to establish the nature of the object required to inflict so severe a fracture, namely, an object such as a gun. The gun, therefore, had probative value and was properly admitted.

Appellants contend that the trial court should have declared a mistrial because some of the jurors had read newspaper articles which appellants claim were inflammatory and untrue. When the court was informed of the publication in the press of certain articles relating to the trial, he inquired as to whether any of the jury had seen or read the articles. Upon being advised that three of the jurors had seen such articles, the court proceeded to interrogate them as to possible prejudice or influence resulting therefrom. Satisfied that they would not be adversely affected by the articles, the court in the exercise of discretion denied the motion for a mistrial. The cautionary instructions to the jury at the time and in the charge were adequate. The problem frequently presented in large metropolitan centers in connection with long trials which attract public attention has been thoroughly covered in the opinion in *United States* v. *Agueci*, 310 F. 2d 817, 831 (2 Cir. 1962), *cert. denied sub nom. Guipene* v. *United States*, 372 U. S. 959 (1963). No reversible error resulted from the court's refusal to declare a mistrial.

During the trial a photograph was shown to the witness Ferraioli to refresh his recollection. The trial court who characterized Ferraioli as an "unwilling witness" has broad discretion in passing upon appropriate trial procedures. He is in the best position to sense and evaluate the courtroom atmosphere and witness reluctance or hostility. The use of photographs and statements in connection with the examination of the witnesses Ferraioli and Ramsey under all the surrounding circumstances was proper.

The incident which appellants characterize as "improper and inflammatory remarks during his [the prosecutor's] summation" consisted of a question, "And where is Carmine Lombardozzi? Could the Government have brought forward Carmine—" At this point an objection was made and the Court said: "The defendants are not required to bring in any witnesses." Colloquy then ensued at the bench out of the presence of the jury. In such colloquy, defense counsel represented the rhetorical question to have been "Why didn't they call Carmine Lombardozzi?" The record does not substantiate this representation. The subject of the discussion was concluded by the Court instructing the jury that "the Government has a right to call any witnesses [sic] it pleases, and the defendants have a right to call any witnesses [sic] they please. But the defendants are not required to call any witnesses; that is their prerogative. They don't have to prove their innocence in the case." This was an accurate statement of the law. Since the prosecutor's abortive comment as to Carmine Lombardozzi was cut short by objection and never finished, it cannot by the most speculative inference be twisted into an accusation that appellants were derelict in not producing and calling him.

Judgment affirmed.

APPENDIX B

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

"Section 1. * * * nor shall any state deprive any person of life, liberty or property without due process of law * * *."

111, TITLE 18, UNITED STATES CODE

"§111. Assaulting, resisting or impeding certain officers or employees

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 688."